CHIEW FOO HUA

v.

MIRI DAILY NEWS & ANOR

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[SUIT NO: 22-06-1995(MR)
23 OCTOBER 2000

CIVIL PROCEDURE: *Pleadings - Material facts - Necessity to disclose material facts*

CIVIL PROCEDURE: *Pleadings - Material facts not disclosed - Whether opposing party should object - Implications of failure to object*

TORT: *Defamation - Libel - Whether words complained of referred to plaintiff*

TORT: *Defamation - Libel - Words referring to plaintiff as dishonest, a cheat and swindler - Whether words complained of defamatory*

TORT: *Defamation - Libel - Defence of justification - Need to establish truth of all material statements complained of - Whether necessary to prove truth of every charge - Whether words not proved material to the injury suffered by plaintiff*

The plaintiff sued the defendants for alleged libel contained in an article in the issue of their newspaper dated 4 August 1994 with the headline 'Suspect Heavily in Debt. Absconded with RM3 Million. Proprietor of Goldsmith Shop Absconded with Family Fled To Distant Land.'

The defendants admitted publication of the said article but denied that the words in the article complained of by the plaintiff bore or were capable of bearing or of being understood to bear any of the meanings alleged by the plaintiff in the statement of claim. They further pleaded that if the article was in fact defamatory, the said words were true in substance and in fact.

The plaintiff at the final submission stage raised an objection that the defendants had failed to plead the particulars of fact that were sought to be justified.

Among the issues for consideration were: (i) whether the said article referred to the plaintiff; (ii) whether the article in its natural and ordinary meaning was defamatory to the plaintiff; (iii) if the answers to (i) and (ii) were in the positive, whether the defendants had established a valid defence as pleaded.

Held:

[1] The underlying rationale for requiring such material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which depart from pleaded material facts, for which evidence, if altered, will prejudice and embarrass or mislead the opposing party. If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges for such evidence to be disregarded by the court, and the court will then uphold such a timely objection.

[1a] Generally in civil cases, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent.

[1b] On the facts, the failure to plead particulars of facts was waived or inferentially consented to when the evidence was adduced without objection by the plaintiff. The fact that the plaintiff chose to proceed with the hearing without asking for further and better particulars showed that he was not in any way prejudiced with the absence of such particulars. The defence was therefore justified in relying on all evidence relevant to the imputation.

[2] Although the article did not name "Chiew Foo Hua" expressly but only reported that the said goldsmith was "Mr Chiew" there were sufficient extrinsic facts in the article to enable an ordinary reader, a fair-minded reader not avid for scandal, to come to the conclusion that it referred to Chiew Foo Hua.

[2a] There was no misnomer or irregularity in the description of the plaintiff so as to require any amendment since the plaintiff in the case was readily identifiable as Chiew Foo Hua who was carrying on the business of a goldsmith in the name of Poh Kwong Goldsmith. In any event, such an irregularity could be cured under O. 2 r. 1(2) of the Rules of the High Court 1980.

[3] The allegation that the plaintiff, a goldsmith shop proprietor was heavily indebted and had absconded with RM3 million would tend to damage his character and integrity by depicting him as a dishonest businessman, a cheat and a swindler. The said article therefore contained various allegations that were defamatory to the plaintiff.

[4] In order to succeed in the defence of justification, the defendants must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein. In order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts. However the plea of justification does not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charge.

[4a] Based on the evidence adduced, the defendants had failed to prove that the words contained in the article were substantially true or that the main charge or gist of the libel was true. The defence of justification therefore fails.

[5] In assessing the appropriate damages for injury to reputation, the factors to the taken into account are: (i) the position and standing of the plaintiff; (ii) the gravity and seriousness of the libel; (iii) the mode and extent of the publication; (iv) the mental distress, hurt anxiety and mental anguish caused to the plaintiff as a result of the libel; (v) the uncertainty undergone in litigation; (vi) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and (vii) the absence of refusal of any correction, retraction or apology.

[5a] Taking into account the position and standing of the plaintiff, the tremendous emotional distress suffered, the seriousness of the allegation and the effect of such a defamatory article on the character, integrity and honesty of the plaintiff, the sum of RM40,000 is awarded.

[Judgment for the plaintiff.]

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1966] 2 MLJ 66 ***(refd)***
Belt v. Lewis ***(refd)***
Cheah Cheng Hoc & Ors v. Liew Yew Tiam & Ors [2000] 5 CLJ 475 ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***
John v. MGN Ltd [1997] QB 586 ***(foll)***
Lee Kuan Yew v. Chin Vui Khen [1991] 3 MLJ 494 ***(refd)***

Ling Wah Press (M) Sdn Bhd & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [2000] 3 CLJ 728 ***(foll)***
MGG Pilai v. Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 CLJ 912 ***(foll)***
Superintendent of Land and Survey (4th Div) v. Hamit Matusin [1994] 3 CLJ 567 ***(refd)***
Tan Sri Datuk Patinggi Hj Abdul Rahman Ya'akub v. Bre Sdn Bhd [1996] 1 MLJ 387 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 8
Evidence Act 1950, s. 32(1)(b)
Rules of the High Court 1980, O. 2 r. 1(2), O. 18 r. 12, O. 78 r. 3(2)

Other source(s) referred to:
Gatley on Libel & Slander, 7th edn, paras 351, 354
Gatley on Libel & Slander, 9th edn, para 11.7
Halsbury's Laws of England, 4th edn, para 182
Keith & Evans, *The Law of Defamation in Singapore and Malaysia*, 2nd edn, pp 49, 50

For the plaintiff - Bong Ah Loi; M/s Bong & Co
For the respondent - Jimmy HT Wee; M/s Jimmy HT Wee & Co

Reported by Mariette Peters-Goh

JUDGMENT

Sulaiman Daud JC:

The plaintiff is at all material time the sole proprietor of a goldsmith business called "Poh Kwong Goldsmith" at No 5, High Street, Miri. The first defendant is and was at all material time the publisher of the Chinese language newspaper called "Miri Daily News" (the newspaper) and the second defendant is the printer of the newspaper. In an action commenced by writ issued on 31 July 1995 the plaintiff sued the defendants for alleged libel contained in an article in the issue of the newspaper dated 4 August 1994 ("the said article"). The said article appeared on the front page of the newspaper with the headline "Suspect heavily in debt. Absconded with three million. Proprietor of goldsmith shop brought whole family fled to distant land" and runs to 21 paragraphs of print of varying length together with two photographs of a house which appeared to have been ransacked. In the statement of claim the plaintiff complained of the whole of the said article which the plaintiff found to be defamatory. The article in its agreed English translation reads:

a

SUSPECT HEAVILY IN DEBT ABSCONDED WITH THREE MILLION
PROPRIETER OF GOLDSMITH SHOP ABSCONDED WITH FAMILY FLED TO DISTANT LAND

Shop and residential houses kept locked for 3 days, goldsmith shop's
b proprietor suspected to be heavily indebted, absconded with large sum of money about 2 to 3 million Ringgit Malaysia and was off to distant parts, leaving no member of his family at his home, angry creditors forced entry into his premises, removed those heavy belongings leaving behind from both his home and shop in order to set-off the debt.

c From reliable sources, the goldsmith shop proprietor whose present whereabouts is unknown, is a 40 plus year old middle-aged businessman Mr. Chiew, a Foochow, a family of 6 members, living at Pujut 4 and operating the goldsmith shop at the High Street here for the past few years.

Without any presage, the said goldsmith shop after paying the salary to its
d 8 workers on the 31st day of July, suddenly closed its business on the 1 day of August. Besides the shop premises, his residential house at Pujut was also kept locked. The occupants had gone and left the house empty, nobody knew the whereabouts of the proprietor and his family.

It is said, on the 1st instant, when Mr. Chiew the proprietor failed to open
e his goldsmith shop, his 8 employees did not know about it and they came as usual to work on that morning, after waiting for 1/2 day, the proprietor was still not seen and did not turn up to open the shop, making it impossible for them to enter the shop, they telephone their employer's home at Pujut but nobody answered the telephone, they felt something unusual, then they went to the proprietor's home to investigate. As a result, they were shocked
f to learn that their employer's whole family have left an empty house, not knowing whether he left for traveling or was he off to distant parts due to the heavily in debt.

On the 2nd day of this month, Mr. Chiew and his family have still not appeared, did not return home. His relatives and creditors became suspicious.
g

Today, that is the third day of Mr. Chiew's disappearance, the creditors saw that the situation is not right, they went to look for him everywhere and inquire about his where-about, but make a futile effort. Finally, they all went to his premises and forced entry into the unoccupied house, removing all valuable items that they found, regardless of the laws.
h

This incident of the disappearance of the goldsmith proprietor and his family is also a shock to all people in town, everybody is talking about the matter.

From inside sources, they suspect that Mr. Chiew has incurred debts heavily, with no means to pay, that's why he planned and absconded; including even
i our newspaper also received many anonymous telephone calls believed to

be the creditors, questioning why we did not report on this incident. And also provided informations which are difficult to distinguish truth from falsehood.

The information points out that from estimates after the disappearance of the goldsmith proprietor, Mr. Chiew, the debt owed and the sum he absconded with amounting to 2-3 million ringgit.

THE GOOD MAN MADE AN UNWISE DECISION

Our newspaper received an anonymous telephone call today which points out that, the businessman Mr. Chiew before he left, had became a head of illegal "Hwei", and had recruited many "Hwei" members with each member putting in not less than RM5,000.00 of illegal "hwei" money.

The anonymous telephone caller expressed that, the businessman Mr. Chiew normally give the impression that he is a gentleman, treat people friendly, be hospitable and straight forward, that's why he has many friends, and everybody likes to deal with him. And when he is tight financially and has cash-flow problem, he borrowed money from friends to keep afloat, but he remained trustworthy, he paid every debt, with high interest, because of this, most people trusted him.

Besides this, he did falsely claim to be a big shareholder of one local well known supermarket doing business quite well.

He expressed that, because of this, few days before the businessman Mr. Chiew's disappearance, under the circumstances of nobody doubting him, he succeeded to borrow huge sum of money from many relatives and friends, including:

(1) On the day before he left off to a distant part, that is on the 31st day of July, he borrowed a sum of RM10,000.00 from the businessman next door, as a result, after the 3rd day of the disappearance, the said businessman as if awakening from his dream, was shocked to realise that he had been cheated. When he failed to recover the debt, he had to go to the goldsmith shop to remove the air conditioner to set off the debt.

(2) From the illegal "hwei" transactions and loan sharks, the sums he induced and absconded with, owing to his friends a huge sum of about 1.6 million ringgit.

(3) He also induced a taxi driver to lend a huge sum of RM80,000.00. According to inside sources, the said taxi driver had mortgaged his own house to the bank for RM50,000.00 to raise the said RM80,000.00 to be lent to him only after much calculation but still made his mistake, losing the original capital.

(4) From reliable sources, his residential house at Pujut 4 was bought with a bank loan of RM190,000.00, to be repaid by instalments, which he has not fully repaid.

(5) Owing West Malaysian gold supplier RM280,000.00 which is unpaid. The information says that before he left, he had issued a post dated cheque for RM280,000.00 to the said supplier, but until now, the said cheque cannot be cashed due to his disappearance, causing the said gold supplier as restless as an ant on a hot pan, jumping up and down, prepared to come to Miri within the next few days to recover the debt and to lodge police report.

The anonymous telephone caller also informed reporter, somebody found the said Mr. Chiew's saloon car at Kuala Baram, he only saw the saloon car but not the owner.

POLICE HAS NOT RECEIVED REPORT

In respect of the above-mentioned rumours, the reporter went to the Central Police Station today to make enquiry, the said authority stated that during the past 3 days, they have not received any such report. One employee of the goldsmith shop of businessman Mr. Chiew informed the reporter that after the disappearance of Mr. Chiew, he has now become unemployed.

He said, he intends to contact the other 7 colleagues to seek assistance from the Labour Department. He expresses that he had never thought that his employer would "abscond", because on the 31st day of July, the employer did pay salaries to them as usual (but without termination compensation).

He deeply believes that the employer's absconding has been well planned, including before the incident, the employer had spread the false rumour that he was going to move to a new house soon, and under the impression of such false rumour, step by step he removed and sold the furnitures and electrical appliances, leaving behind only the heavy and worthless items at the unoccupied home.

When queried whether there were gold jewelleries left inside the goldsmith shop, he express that, from peeping through the door loop-hole into the shop, the gold and jewelleries inside the shop have all been removed, believing that after the payment of wages to the employees on the 31st, after they have left work, his employer collected and removed all items in the middle of night.

From reliable sources, the said businessman went through the border check point between Sarawak and Brunei at Sungai Tujuh to leave the country and escaped to other country from Brunei, nobody knew his temporary lodging place in order to escape his creditors.

The reporter paid a visit to his home this morning, only saw the lock of the door was broken, the door opened, very messy inside the home, the house was left unoccupied, leaving behind only a few abandoned dogs even though unfed, still stupidily looking after the house for their master. These few dogs are being temporarily fed and succoured by caring neighbours with their left over rice and biscuits.

The Plaintiff's Complaint

The plaintiff complains that the said article referred to him as at the material time there was only one goldsmith in the whole of Miri town by the Chinese surname of Chiew and the description of the person in the said article fits the plaintiff in all aspect. The plaintiff, in para. 4 of the statement of claim, alleged that the natural and ordinary meaning of the words in the said article meant and were understood to mean, *inter alia,* that the plaintiff is a cheat, a swindler, and a dishonest businessman who has willfully planned to defraud his creditors and to run off with his ill-gotten gains. The plaintiff further alleged that article was falsely and maliciously published and by reason thereof the plaintiff has been greatly injured in his character, credit and reputation as a businessman and he now seeks damages.

The Defence

By their defence the defendants admitted publication of the said article that the words in the article complained of by the plaintiff bore or were understood to bear or were capable of bearing or of being understood to bear any of the meaning alleged by the plaintiff in the statement of claim. They further pleaded that even if the words in the article complained of referred to and were understood to refer to the plaintiff and that the said words are defamatory, as so much of the said words as alleged and/or imputed that the plaintiff was a swindler and dishonest businessman who has wilfully planned to defraud his creditors and to run off with his ill-gotten gains, the same are true in substance and in fact. Apart from the said defence of justification the defendants also pleaded the defence of qualified privilege and fair comment. However during submission the learned counsel for the defendants informed the court that the defendants will only rely on the defence of justification.

The learned counsel for the plaintiff for the first time at the final submission stage raised an objection that the defendants have failed to plead particulars of fact that are sought to be justified. The learned counsel in his final submission argued that the defendants should not in their defence of justification be allowed to rely on any such particulars of fact which are

not pleaded in their defence. I agree that there is a strong force in such contention as under O. 78 r. 3(2) of the Rules of the High Court 1980 (the RHC) it is incumbent on the defendants when relying upon the plea of justification and fair comment to plead particulars of the facts that are sought to be justified and on which the comments have been based (see *Lee Kuan Yew v. Chin Vui Khen* [1991] 3 MLJ 494.

In reply the learned counsel for the defendants argued that the imputation as contained in the statement of claim is a general charge and that in the normal course of event the plaintiff should ask the defendants to supply the particulars of the defendants' plea of justification. Therefore the learned counsel submitted that the defendants are at liberty to rely on all evidence relevant to the imputation in support of their defence. I cannot accept the explanation given by the learned counsel. In my view the defendants are bound under O. 78 r. 3(2) to plead the material particulars as required thereby even if the plaintiff did not make such request.

Now what is the effect of such non-compliance. Is it such that the defence of justification should be totally disregarded. In the case of *Superintendent of Land and Survey (4th Div) v. Hamit bin Matusin* [1994] 3 CLJ 567, Peh Swee SCJ (as then was) in delivering the decision of the Court of Appeal stated at p. 571:

> The underlying rationale for requiring such material of facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which depart from pleaded material facts, for which evidence, if allowed, will prejudice and embarrass or mislead the opposing party. If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection. The court will generally however, grant an adjournment if requested, on a suitable term as to cost, etc, for the pleading to be amended by the party seeking to adduce such evidence.

His Lordship further stated at p. 571:

> Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court even without such consent, please see *Baerlein v. Chartered Mercantile Bank* [1895] 2 Ch 488 similarly with rules of procedure ... .
>
> Such evidence when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in the pleading.

I am of the view that the failure to plead particulars of facts which are sought to be justified was waived or inferentially consented to when the evidence was adduced without objection by the plaintiff. Where the defendants did not ask for further and better particulars under O. 18 r. 12 of the RHC, the particulars in question must have appeared to the plaintiff to be unequivocal. The fact that the plaintiff chose to proceed with the hearing without asking for further and better particulars showed that he was not in any way prejudiced with the absence of such particulars. I therefore hold that the defendants are justified on relying on all evidence relevant to the imputation.

The Issue

The issue for determination by this court are as follows:

(a) Whether the said article refers to the plaintiff.

(b) Whether the article in their natural and ordinary meaning were defamatory to the plaintiff.

(c) If the answer to (a) and (b) are in the positive, whether the defendants have established a valid defence as pleaded.

(d) If the answer to (c) is in the negative, what are the damages to which the plaintiff is entitled and the quantum to be awarded in respect thereof.

(e) What are the appropriate sum to be awarded to the plaintiff in respect of each of such damages.

Whether The Said Article Refers To The Plaintiff

In his submission the learned counsel for the defendants admitted that although the said article did not name "Chiew Foo Hua" expressly but only reported that the said goldsmith was a "Mr. Chiew" there were sufficient extrinsic facts in the article to enable an ordinary reader, a fair minded reader not avid for scandal to come to the conclusion that it referred to Chiew Foo Hua. In the circumstances the learned counsel conceded that the said article referred to Mr. Chiew Foo Hua. However he submitted that the plaintiff cannot succeed in this suit as the plaintiff is not the proper party who should sue the defendants. He contended that the party who should sue the defendants is Chiew Foo Hua not Chiew Foo Hua (trading under the name and style of Poh Kwong Goldsmith) which is a firm. In reply the learned counsel for the plaintiff contended that there is no distinction between the two as the plaintiff is trading as a sole proprietor

of Poh Kwong Goldsmith. He further contended that the plaintiff's action herein is not limited to being libelled personally, but also in his business capacity as a goldsmith proprietor. In my view there is no misnomer or irregularity in the description of the plaintiff so as to require any amendment since the plaintiff in this case is readily identifiable as Chiew Foo Hua who is carrying on the business of a goldsmith in the name of Poh Kwong Goldsmith. Even if I am wrong in so deciding, such misnomer, if any, is an irregularity which can be cured under O. 2 r. 1(2) of the RHC as the defendants have not been prejudiced thereby.

Whether The Article Is Defamatory Of The Plaintiff

The learned counsel for the defendants in his submission conceded that the words in the said article in their natural and ordinary meaning were defamatory to "Mr. Chiew" referred to in the article. As the learned counsel had conceded that the said article referred to Mr. Chiew Foo Hua who is the plaintiff in this case, it necessarily follows that the learned counsel had also conceded that the said article is also defamatory to the said plaintiff. Notwithstanding such an admission, there is no doubt in my mind that the said article contains various allegations that are defamatory to the plaintiff. Among others, the allegation that the plaintiff, a goldsmith shop proprietor, was heavily indebted and has absconded with RM3 million tend to damage his character and integrity by depicting him as a dishonest businessman, a cheat and a swindler. The allegation that the plaintiff became the head of an illegal "Hwei" group, and had recruited many "Hwei" members each putting in not less than RM5,000 were designed to impute that the plaintiff had resorted to criminal activity. Apart from the two substantial allegations above-mentioned, the other material statements which I consider to be defamatory to the plaintiff include the following:

(a) that his creditors have made force entry into his unoccupied house removing all valuable items;

(b) that by giving the false impression of being a gentleman, hospitable, straight forward and trustworthy and by falsely claiming to be a major shareholder of a well known supermarket, he succeeded to borrow huge sum of money including a sum of RM10,000 from a businessman and RM80,000 from a taxi driver

(c) that he collected and absconded with the sum of RM1.6 million derived from illegal "hwei" transactions and loan shark;

(d) that he issued post dated cheques amounting to RM280,000 to his gold supplier which were dishonoured.

On The Defence Of Justification

Although the defendants in their amended defence have pleaded justification, qualified privilage and fair comment, their learned counsel during submission told the court they will only rely on the defence of justification. I have dealt with the effect of the irregularity on the pleading earlier.

The Law

In a defamation action, truth or justification is an absolute defence. If the allegation is true no amount of malice, bad faith, or belief and the falsity of the statement will make it actionable. If the defence of justification is raised, the defendants must substantially justify the statements by proving their precise truth. For the defence to succeed, the question to be answered is "Does that which is proved to be true tally with that which the defendant's statement is interpreted to mean?" (see Keith & Evans *The Law of Defamation in Singapore and Malaysia,* 2nd edn at pp. 49 and 50).

In order to succeed in the defence of justification, the defendants must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein. And in order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail 'by reason only that the truth of every charged is not proved if the words not prove to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges' (see s. 8 of the Defamation Act 1957 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66, *Tan Sri Datuk Patinggi Hj. Abdul Rahman Ya'akub v. Bre Sdn. Bhd* [1996] 1 MLJ 387). In a plea of justification, the defendants must prove that the statement published is substantially true. Slight inaccuracies in or more of its detail will not prevent the defendants from succeeding in his defence. It is sufficient to prove the main charge or gist of the libel is true (see *Gatley on Libel & Slander*, 9th edn at para 11.7 and *Cheah Cheng Hoc & Ors v. Liew Yew Tiam & Ors* [2000] 5 CLJ 475.

The standard of proof required is on the balance of probabilities, and the burden of proving justification and fair comment rests entirely on the defendants (*Gatley on Libel and Slander* 7nd edn at paras. 351 and 354 and *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86 at p. 87). In a suit for defamation, once the words complained of are proved to be defamatory and published, the plaintiff is not bound to prove the falsity of these words because the law presumes it to be in his favour (*Belt v. Lewis*). The result is that it is for the defendants to prove that

these words are true (*International Times & Ors v. Leong Ho Yuen*). If we are only concerned with the defence of justification, the plaintiff would have established a *prima facie* cause of action once he had proved publication of the defamatory words. Where the plaintiffs proves publication of the defamatory words it is for the defendants if he wishes to set up the defence of justification to plead and prove the facts on which he relies to show justification. It is for the defence to show that the defamatory imputation is true (*Belt v. Lewis, Abdul Rahman Talib v. Seenivasagam & Anor*).

Having determined the principle to be applied, I shall now proceed to examine separately each of the accusation raised in the said articles and evaluate it as a whole to decide whether the gist of the libel is true. To support the defence of justification the defendants called in seven witnesses one of whom is Ung Khing Hee (DW5), who claimed to have written the article. The defendants also seek to introduce through DW5 the evidence of one Chai Wei Meng (the said reporter) and the allegation against the plaintiff purportedly received by DW5 from an anonymous caller. At the outset I ruled that the evidence of the said Chai Wei Meng and the information received by DW5 from the anonymous caller are hearsay and not admissible. In my view the defendants had not taken such reasonable step practicable to find the said Chai Wei Ming and thus I cannot take such evidence as falling under the exception to the hearsay rule by virtue of s. 32(1)(b) of the Evidence Act 1950. However even if the hearsay evidence of the said reporter is ruled to be admissible it will not lend much weight to support the defendants' defence of justification. I am also of the view that an anonymous caller is not a person who is dead or cannot be found within the meaning of the said exception to the hearsay rule.

Whether The Plaintiff Is Heavily In Debt Prior To His Leaving West Malaysia

The learned counsel for the defendants submitted there was no doubt that the plaintiff was heavily in debt before he went for his alleged holiday. From the documentary exhibits it is obvious that from the months of March 1994 to 12 August 1994 the plaintiff had issued 34 cheques for the sum of RM542,567.90 all of which were returned by his banker. In addition the plaintiff's overdraft facilities owing to Hock Hua Bank Berhad stood at RM153,988.86. With such amount of debt incurred by the plaintiff, I am satisfied that the defendants have succeeded in proving the first limb of their allegation that the plaintiff is heavily in debt. However the sting to the first allegation is that "the plaintiff heavily indebted absconded with large sum of money about RM2 to RM3 million". To succeed in their defence

of justification on this allegation the defendants must prove not only that the plaintiff is indebted but he must prove the other limbs which form the main sting of the allegation, that is the plaintiff had absconded and that he so absconded with a large sum of money to cheat his creditors.

Whether The Plaintiff Plan His Abscondment To Cheat His Creditor

To justify the defendants' allegation that the plaintiff had planned his abscondment to cheat his creditors, the learned counsel for the defendants relied on the fact that the plaintiff is heavily in debt and had no means of paying such debt. There was also evidence of DW7 who confirmed that no gold or jewellery were found in the three safes belonging to the plaintiff when the safes were forced open by the new owner of the premises where the plaintiff carried out his goldsmith business. The defendants also relied on the evidence of DW4 who testified that he was not told by his employer that the shop will be closed for two weeks and that he and three other fellow workers came to work the following day. The learned counsel further submitted that the assertion made by the plaintiff that he went for a holiday is inconsistent with his police report made after his return to Miri in December 1994 where he stated that he went to West Malaysia to update his debt. He also asserted that the fact that his wife followed him a day later with the children three weeks before the term holiday began seemed odd. As such the learned counsel submitted that the only reasonable inference to be taken is that when the plaintiff left Miri he has in fact absconded with the gold and jewellery. He further submitted the fact that the plaintiff did not come back immediateiy after the publication of the article further strengthened such allegation.

In my view when a person who is heavily in debt left for some other place it cannot be said that the only reasonable or probable inference is that he had absconded or bolted to avoid his creditors. We also cannot come to such a conclusion merely because his goldsmith shop was closed for three days and that his house was ransacked. Apart from the testimony of DW7 on the empty safes, the defendants have failed to adduce any evidence to show that the plaintiff had absconded with his ill-gotten gain of RM2 to 3 milllion even if the hearsay evidence of the said reporter is admitted. Further not much weight can be put on DW7 evidence as the identity of the safes alleged to have been forced open were not identified and the other more relevant witnesses such as the owner of the new premises where the safes were placed and the person who opened the safes were not called to testify. From the testimony of PW3, PW4 and PW5 it is more probable that the plaintiff had in fact informed his employees about the closure of the shop before he left for the purported holiday. The fact that the plaintiff

left Miri before the school holiday with all his children cannot lend much support to the defendants' allegation that the plaintiff had absconded. The defendants' allegation that the plaintiff had absconded with his ill-gotten gains was further proved wrong when the plaintiff returned to Miri after he left for West Malaysia.

On the allegation that the plaintiff has absconded with RM2 to 3 million, including the sum owed as debt, it is without doubt the defendants have also failed to adduce any direct or circumstantial evidence on this allegation even if the hearsay evidence of the said reporter is admitted. The testimony of DW7 on the empty safe will not lend any weight to such assertion.

With regard to the allegation that the plaintiff has resorted to illegal activity in operating an illegal "Hwei" group to collect and abscond with the sum RM1.6 million the defendants relied solely on the information received by the said reporter and DW5 from the anonymous telephone call which I ruled as inadmissible see p. (18). In respect of the other allegations the learned counsel for the defendants had conceded that the defendants have failed to adduce any evidence to prove that the plaintiff have succeeded in borrowing a large sum of money by giving a false impression as a gentleman and as major shareholder of a supermarket, and that the plaintiff had borrowed RM10,000 from his neighbour and had induced a taxi driver to lend him RM80,000.

Finding Of Liability

In the final analysis I find that the defendants have failed to prove that the words contained in the said article are substantially true or that the main charge or gist of the libel is true. As such the defence of justification has failed. Both the defendants are therefore jointly liable to the plaintiff for defamation.

Damages

The rules relating to the principles on which the quantum of damages is to be assessed have been crystallised from various cases. The Federal Court in *Ling Wah Press (M) Sdn. Bhd. & Ors. v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [2000] 3 CLJ 728, referred to with approval a passage from *John v. MGN Ltd* [1997] QB 586 where Sir Thomas Bingham MR (now CJ) said at p. 607 as follows:

> In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel, the more closely it (the defamation) touches the plaintiff's personal intergrity, professional reputation, honour, courage, loyalty and the core attributes to his personality, the more serious it is likely to be. The extent of publication is also very relevant: libels

published to millions has a greater potential to cause damage than libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation but the significance of this is much greater in a case where the defendants asserts the truth.

In *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [1995] 2 CLJ 912, the Court of Appeal had accepted the established principle in the assessment of general damages where the following consideration ought to be taken into account:

(a) the position and standing of the plaintiff;

(b) the gravity and seriousness of the libel;

(c) the mode and extent of the publication;

(d) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(e) the uncertainty undergone in litigation;

(f) the conduct of the defendants from the time of the libel down to the very moment of the verdict;

(g) the absence of refusal of any correction, retraction or apology.

After taking into account all the facts of the case I award the plaintiff general damages, in the sums of RM40,000 against the first and second defendants after taking into account the aggravating factors as hereinafter set out. Interest on the above sums at the rate of 8% p.a. from the date of judgment to the date of full recovery. Aggravated damage need not be specifically pleaded as it can form part of or included in the sum awarded for general damages (see *Halsbury's Laws of England* 4th edn at para 182).

In awarding the damages I have taken into consideration the position and standing of the plaintiff at the time of the publication of the article ("material time"). From the evidence adduced I am satisfied that at the material time although the plaintiff was carrying out the business of a goldsmith but it is apparent that he was in financial difficulties with big sums owing to the bank and individual in the form of dishonoured cheque and other debts. The fact that he did not return to Miri immediately after being informed of the publication of the article clearly showed his lackadaisical attitude towards his business. I also cannot accept the argument put forward by the learned counsel for the plaintiff that the plaintiff's career and business was literally destroyed by the publication of

the said article. There is nothing to prevent him from returning home immediately after being notified of the incident to save whatever stock of gold and jewelleries, if any, that was said to have been stored in the three safes as alleged by him. The fact that he delayed his return to Miri for four months and did not make any attempt to ensure the safe custody of his gold and jewelleries will only lead to the reasonable inference that he has nothing left to carry on with his business as a goldsmith.

However it is without doubt that as a result of the libel the plaintiff and his family members have suffered tremendous emotional distress. The defamatory words have destroyed his reputation and social position in society. The allegations against him is of a serious nature which directly have effect on his character, integrity and honesty. Although there was an offer to publish a written apology in the defendants' newspaper but it was made upon condition that there shall be no payment of money to the plaintiff (exh."DS"). In my view an apology may still be made regardless whether the plaintiff accepted the apology or not. In making the award I have also considered the fact that the defendants have failed in their plea of justification which can be a ground for this court to increase the award. In considering the award I have also taken into account the daily circulation of the newspaper and the extent of the publication.

I also award cost to the plaintiff to be taxed unless otherwise agreed.